elections paid for by the expenditure of public funds. *State* v. *Felton*, 84 N. E. 85. It is to be noted that the Ohio law is not mandatory, that candidates may still be nominated by a petition signed by a fixed number of voters, and that it is probable that informal primaries may still be held, though a convention chosen in this way will be given no legal recognition.[4] The principal constitutional question raised by this and similar acts is whether the smaller parties are denied equal protection of the law.[5] It will be noticed that the acts regulate the manner of nominating candidates or choosing delegates rather than qualify who may serve or who may act. It is true, however, that they give different-sized groups of voters different opportunities for putting their candidates' names on the official ballot, but this would not seem a fatal objection so long as no undue difficulty is imposed upon any one class. And regulation of some sort is essential in view of the fact that voters must necessarily be dealt with in masses; and since any system by which one or two men could nominate candidates would be unworkable, the prescribing of methods by which the larger and more cumbrous parties may make their true choice of candidates is a reasonable discrimination. This view is supported by decisions upholding the limitation of nomination by certificate from a party convention to a party which has polled a certain per cent of the votes cast at the last preceding election, relegating smaller parties to nomination by petition.[6] Moreover, other states have held their primary election acts with similar provisions constitutional.[7] Nor does the frequent provision of state constitutions that all elections shall be free and equal affect the result, since this clause merely refers to the protection of voters and to the value of each man's vote.[8] In general, therefore, it would seem that classification of parties as to methods of nomination on the basis of size, if no more than reasonable regulation, does not violate the Fourteenth Amendment by denying equal protection of the law.

The Ohio court also held that the fact that these primaries were to be run at public expense did not render them unconstitutional. It was argued that public money was not being used for a public purpose, and hence taxation to support primaries was not due process of law. This argument seems untenable in view of the fact that the protection of the purity and expedition of elections, the purpose of these acts, is a fundamental function of state governments, unabridged by the constitution.[9] When, however, the law steps outside the bounds of reasonable regulation and is merely conferring a privilege on certain parties at the expense of the general public, taxation to support it would, of course, cease to be due process of law.

APPLICATION OF PAYMENTS. — An inferior Canadian court has recently held that a payment the application of which was not directed by the

[4] But *cf.* Young *v.* Beckham, 115 Ky. 246.

[5] Cooley, Const. Lim., 7 ed., 899.

[6] State *v.* Poston, 58 Oh. St. 620; Corcoran *v.* Bennett, 20 R. I. 6; State *v.* Black, 54 N. J. L. 446.

[7] State *v.* Jensen, 86 Minn. 19; Kenneweg *v.* County Comm., 102 Md. 119; Ladd *v.* Holmes, 40 Ore. 167; State *v.* Drexel, 105 N. W. 174 (Neb.). See People *v.* Election Comm., 221 Ill. 9. But *cf.* Britton *v.* Election Comm., 129 Cal. 337 (mandatory act).

[8] See 23 Am. L. Rev. 728; Ladd *v.* Holmes, *supra*, 178.

[9] Kenneweg *v.* County Comm., *supra*.

debtor cannot be applied by the creditor to an outlawed debt in preference to an enforceable one. *Charles* v. *Stewart*, 11 Ont. Wkly. Rep. 421 (Ont., Fifth Div. Ct., Jan. 2, 1908). There is no reason to suppose that this is the law of the particular jurisdiction,[1] or of any common law tribunal.[2] According to the usual statement of the common law on this subject, the payment may be applied by the debtor, by the creditor, or by the court, in the order named.[3] It is believed that the apparent confusion in the cases has arisen from the fact that the rule is thus briefly stated in terms of the legal result, with no indication of the course of reasoning by which such a result may be reached.

Payment comprises both the act of handing over money with the intent to pay and the act of receiving it with the intent to be paid. Where there is only one debt, the creditor's intention is as essential as the debtor's; hence, when there are several debts, the intention of neither party, if uncommunicated, should determine which debt is discharged.[4] If, however, at the time of payment the debtor expressly or impliedly communicates his intention, the creditor, though actually dissenting, is nevertheless bound, since after accepting the money he will not be allowed to deny that he accepted the terms.[5] Upon the same principle, if the debtor is silent, and the creditor communicates his intention at the time when he receives partial payment, which he could refuse without prejudice,[6] the debtor is bound thereby.[7] If neither declares his intention at the time of payment, each is presumed to make a continuing offer to assent to the subsequently expressed intention of the other, so that whichever first communicates his intention controls the application.[8] This offer to assent will not be presumed in the case of unreasonable preferences, as when the creditor attempts to apply to illegal[9] or unmatured debts;[10] but it is probable that if at the time of payment the creditor communicated his unreasonable preference, and the debtor received the benefit of the creditor's acceptance of partial payment, the debtor would be bound. The test of reasonableness would also seem to furnish a rule, and reconcile the cases, as to the time at which the parties may apply. Accordingly, under ordinary circumstances, either party should be allowed to apply at any time, even after judgment,[11] provided the question of the particular application has not been litigated; but most courts hesitate to go to this length.[12] Another suggested result, for which no authority has been found, is that when the debtor pays the exact amount of one of two equal debts, the creditor's intention would

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1 See Fraser *v.* Locie, 10 Grant Ch. (U. C.) 207.

2 McDowell *v.* McDowell's Estate, 75 Vt. 401. The principal case is in accord with the civil law. Civ. Code of La., Art. 2166.

3 See Munger, Application of Payments.

4 Terhune *v.* Colton, 12 N. J. Eq. 232; Simson *v.* Ingham, 2 B. & C. 65.

5 Anon., Cro. Eliz. 68.

6 Dixon *v.* Clark, 5 C. B. 365.

7 See Smith *v.* Wigley, 3 M. & S. 174.

8 Huffman *v.* Cauble, 86 Ind. 591.

9 Phillips *v.* Moses, 65 Me. 70.

10 Early *v.* Flannery, 47 Vt. 253.

11 Marsh *v.* Oneida Central Bank, 34 Barb. (N. Y.) 298. *Contra*, Smith *v.* Betty, [1903] 2 K. B. 317.

12 The weight of American authority requires, incorrectly, it is believed, that the debtor apply at the time of payment, the creditor before action brought. See 2 Am. & Eng. Encyc., 2 ed., 444 *ff.* In England a creditor has been allowed to apply in the witness-box. Seymour *v.* Pickett, [1905] 1 K. B. 715.

never be operative unless actually assented to by the debtor, since the creditor would have no right to impose terms on his acceptance.

The principle of presumed assent finds full scope in the case where neither party has at any time communicated his intention; then that application is presumed to have been agreed upon to which it is most probable that the parties would have assented.[13] Here certain rules of presumption have grown up, such as that the earliest items in a running account,[14] or the most precariously secured debts,[15] or the debts not yet barred,[16] shall be preferred; but these presumptions should be rebuttable.[17] For the essential distinction between the so-called common law and civil law rules is not that the one favors the creditor, the other the debtor, but that the civil law and other codes[18] provide fixed rules of application, whereas at common law the application of a payment depends upon the agreement of the parties, actual or presumed. It follows that, strictly speaking, the court itself never applies a payment, but in all cases merely construes the acts of the parties.

APPROPRIATIONS TO REIMBURSE MUNICIPAL OFFICERS FOR EXPENSES INCURRED IN LITIGATION. — An appropriation to reimburse certain town officers who had made an arrest for the supposed violation of a local liquor law for their expenditures in a suit against them for false imprisonment, by which they were compelled to pay damages, was upheld in a recent Massachusetts case. *Leonard* v. *Inhabitants of Middleborough*, 84 N. E. 323. This reimbursement of municipal officers for expenses incurred in the supposed discharge of their duties may involve two considerations; for the validity of the expenditure of public money by a town or a city may be attacked on the ground that it is not within the corporate powers of the town or city as granted by the legislature,[1] or on the ground that it is not for a public purpose.[2]

The authorities are clear that it is within the power of a municipality to reimburse its officers for expenses incurred in litigation occasioned by lawful acts done in the course of duty.[3] But the courts go further, and, as in the present case, sustain appropriations where the officers have committed a tort or other illegal act.[4] Apparently the only limitations on this doctrine are that the officer must have incurred the liability while acting in good faith,[5] and that the municipality must have a direct interest in the discharge of the particular duty.[6] The courts adopt the theory that since a municipality may expend money for its own defense, it may make appropriations for its agent's defense,[7] when the agent incurs a liability while acting for the

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[13] The Martha, 29 Fed. 708.
[14] Clayton's Case, 1 Meriv. 585.
[15] Field *v.* Holland, 6 Cranch (U. S.) 8. *Contra*, Pond *v.* Harwood, 139 N. Y. 111. *Cf.* The Mecca, [1897] A. C. 286.
[16] Estes *v.* Fry, 166 Mo. 70. *Contra*, Indian Contract Act, § 61.
[17] The Mecca, *supra*.
[18] Cal. Civ. Code, § 1479; Ga. Civ. Code, § 3722.

[1] Bloomfield *v.* Charter Oak Bank, 121 U. S. 121.
[2] Loan Ass'n *v.* Topeka, 20 Wall. (U. S.) 655. See 21 HARV. L. REV. 277.
[3] Fuller *v.* Groton, 11 Gray (Mass.) 340.
[4] Moorhead *v.* Murphy, 94 Minn. 123.
[5] Cullen *v.* Carthage, 103 Ind. 196.
[6] Vincent *v.* Inhab's of Nantucket, 12 Cush. (Mass.) 103.
[7] Sherman *v.* Carr, 8 R. I. 431.